

## Saint Louis University Law Journal

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Volume 55

Number 1 *Tributes to Jeffrey E. Lewis, Dean Emeritus and Professor of Law (Fall 2010)*

Article 14

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2010

### The Promise of International Tax Scholarship and Its Implications for Research Design, Theory, and Methodology

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#### Recommended Citation

Diane Ring, *The Promise of International Tax Scholarship and Its Implications for Research Design, Theory, and Methodology*, 55 St. Louis U. L.J. (2010).

Available at: <https://scholarship.law.slu.edu/lj/vol55/iss1/14>

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## **THE PROMISE OF INTERNATIONAL TAX SCHOLARSHIP AND ITS IMPLICATIONS FOR RESEARCH DESIGN, THEORY, AND METHODOLOGY**

DIANE RING\*

### **INTRODUCTION**

What should international tax scholars be doing? Over the past two decades, international tax has grown both as a practice area and as a field of study. Scholars have begun devoting significant attention to the development, design, and implementation of international tax law. This activity is accompanied by a reflection on the previous scholarship and its goals, method, and content. Such reflection is not unique. Legal scholarship generally and tax scholarship in particular has struggled to understand the role and contribution of legal scholars.

How do scholars evaluate international tax policy? What approaches do they adopt in their efforts to better understand, assess, and influence international tax? A review of modern international tax scholarship reveals that as the field has matured, international tax scholars have increasingly turned to other disciplines, especially social sciences, for their insights, ideas, and research to improve understanding of international tax policy. But this intersection with the social sciences (and the humanities) forces us to confront some distinct differences between the approach of the legal academy to research and scholarship and the approaches used in other fields. Many of the disciplines upon which international tax scholars rely explicitly discuss and examine questions of research design, methodology, and analysis in ways that are relatively foreign to the international tax scholar. In many other fields, a conscious examination of methodological options and decisions is an important component of the research process as scholars consider their goals, their questions, and the sources available for their work. As the tax academy increasingly reaches into other disciplines, we question what constitutes the core of our own discipline and what we can uniquely contribute.

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\* Professor of Law, Boston College Law School. I would like to thank the Carney Endowment at Boston College Law School for its research support. I would like to thank the participants of the Saint Louis University School of Law Sanford E. Sarasohn Memorial Conference on Critical Issues in International and Comparative Taxation for their comments and insights. I would also like to thank Kathryn McHugh and Natalene Ong for their valuable research assistance.

The relationship between law and social sciences has been the subject of both theoretical analysis by legal scholars examining the distinctive role of legal scholarship and by other scholars critical of the quality of research and empirical analysis in the legal setting.<sup>1</sup> The purpose of this essay is not to revisit the question of the overarching role of legal scholarship. Rather, the goal is to draw upon this existing literature and its insights regarding research agenda, methodology, and analysis. Ultimately, international tax scholars have a strong claim to a vital role. The importance of non-legal disciplines to the development of international tax policy, combined with the perceived inaccessibility of international tax to those working outside the field, renders international tax distinctive—if not unique. The burden rests upon the international tax community to establish a robust, broad, and comprehensive research structure capable of integrating guidance from other disciplines. International tax scholars need to look beyond the traditional bounds of their field, but they cannot abdicate their territory to other disciplines. The real challenge is how to manage both strands effectively.

At a minimum, international tax scholars must develop increased sophistication regarding the content, limits, and potential weaknesses of various forms of social science research. This will allow them to be both more sophisticated consumers of work from other fields and more confident producers of research valuable to our understanding of international tax policy. Tax research itself ultimately can be influential on the disciplines from which it draws. This essay outlines an example from the intersection of international tax with international relations and political science, revealing the potential for mutual influence.

To better understand the potential challenges and possibilities for international tax scholarship, Part I of this Essay reviews general critiques of legal scholarship offered in recent decades, and of tax scholarship specifically. This literature recognizes the limits of certain legal scholarship, but does provide a path to more relevant scholarship—including a path for those working within international tax. Part II examines how the body of existing international tax scholarship fits within the critiques and possibilities explored in Part I. Although international tax research holds promise as a path for reinvigorating tax scholarship, it has not been entirely free of the constraints that bound traditional domestic tax scholarship. Despite these all too familiar limitations and constraints, international tax scholarship also exhibits much of the anticipated promise of a field that can be dynamic, commercially relevant, and global. Part III considers the unique position of international tax scholarship and how it can most effectively fulfill its promise. The aim is not

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1. See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6 (2002); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1835 (1988).

to mimic another discipline but to learn what steps can produce valuable international tax scholarship within the goals and needs of the legal system. The Conclusion ponders the benefits of an international tax scholarship that has more consciously reflected upon its purpose and design, and that recognizes the distinctive place of international tax scholarship relative to legal scholarship and the social sciences.

### I. REFLECTIONS ON LEGAL SCHOLARSHIP

What is the function of legal scholarship? What makes it distinctive and valuable? In recent decades these questions have been raised in a variety of contexts by those seeking to understand the appropriate relevance and value of legal scholarship in a changing world.<sup>2</sup> These self-reflections have emerged in other non-legal fields, albeit with a somewhat different history.<sup>3</sup> During the twentieth century, the social sciences faced challenges to their methodologies and self-conceptions from a set of broad critiques often grouped under the umbrella term of “critique of methodology” analyses.<sup>4</sup> At its core, this work was a challenge to positivism that pervaded twentieth century research.<sup>5</sup> This critique was less troubling to legal scholars because law had already come to terms with a related challenge through the rise of legal realism in the 1920s and 1930s.<sup>6</sup> The difficulty for legal scholarship was, instead, the absence of a clear and distinctive mission, methodology, and purpose.<sup>7</sup> Comparisons to other disciplines with which legal scholars were becoming increasingly familiar, and which were viewed as having more robust and distinctive identities and methodologies, highlighted the potential failings in legal scholarship.<sup>8</sup> Moreover, to the extent that legal scholars borrowed or adopted methodologies from other disciplines, the questions of competency and value added continued to shadow their work.<sup>9</sup>

2. See, e.g., Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1886–88 (1993); Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 523–24 (1997); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 892–94 (1992). See generally Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987) (discussing the declining value of legal scholarship).

3. Rubin, *supra* note 1, at 1835.

4. See *id.* at 1835–37.

5. *Id.* at 1839.

6. *Id.* at 1855.

7. *Id.* at 1835.

8. Rubin, *supra* note 1, at 1835.

9. See, e.g., Epstein & King, *supra* note 1, at 6 (offering a critical and unflattering assessment of “empirical research” in legal scholarship); Rubin, *supra* note 1, at 1853 n.56 (recognizing legal scholarship on similar topics lacks critical perspectives included in political science scholarship).

As legal scholars have wrestled with these questions and sought to carve out a plausible vision for future legal scholarship that is vibrant, distinctive, and valuable, tax scholars have pondered comparable questions in the context of tax scholarship. Although much of the broader literature on legal scholarship resonates with the tax field, the effort to narrow the focus of discussion to one field promised to generate more concrete and more readily accessible guidance for scholars. In his 1998 article, Michael Livingston asked how legal scholars, in particular tax scholars, could “avoid the trap of being second-tier economists on the one hand, or mere technicians on the other?”<sup>10</sup> Driven by the questions haunting legal scholars who increasingly utilized the methods of economics, philosophy, and other non-legal disciplines (and thus questioned their own role), Livingston suggested that these concerns were most pressing for tax lawyers who had long shared their field with economists, but who were finding their distinctive place in the field more vulnerable.<sup>11</sup>

The relationship between tax law and economics is not new (as it is in some fields). As Livingston observed, tax scholars, whose audience is primarily the legislative branch and their administrative staff, have generally relied on economics to provide the method and normative structure for their work.<sup>12</sup> In approaching tax analysis from the perspective of equity, efficiency, and the ideal of a comprehensive tax base, tax scholars crafted a field ultimately grounded in economics.<sup>13</sup> This reality prompted the question, why should lawyers intermediate this work between economics and legislation? The answer that the tax academy offered was that they were creating an “accessible scholarship” that combined streamlined economic discussion with an understanding of legal rules, arguments, and precedent to provide guidance for the real world—the “practical reason approach.”<sup>14</sup> Initially reflected in the work of pioneer tax scholar Henry Simons, scholarship in this mode was apolitical in style and was grounded in the “economic” principles of a comprehensive tax base ideal.<sup>15</sup> Livingston outlined how subsequent tax scholars strongly echoed this tradition in their work, and although the underlying economics were not sophisticated, the scholarship maintained a valued function by virtue of its accessibility and potential for guiding reform.<sup>16</sup>

Where, then, did the problem arise for tax scholars? Livingston identified three sources of challenges to the established role of the tax scholar in a

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10. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 366 (1998).

11. *Id.* at 366–67.

12. *Id.* at 373–74.

13. *Id.* at 374.

14. *Id.* at 375.

15. Livingston, *supra* note 10, at 375–76.

16. *Id.* at 380.

framework undergirded by economics: 1) the rise of new economic approaches, including optimal tax theory, that replaced the dominant position of the comprehensive tax base approach;<sup>17</sup> 2) the rise of ideas, including critical legal studies, that challenged the value of normative scholarship generally; and 3) the growing importance of tax issues for which traditional scholarship with its comprehensive tax base foundation was not really relevant.<sup>18</sup> First, with the rise of optimal tax theory and others, including public choice theory,<sup>19</sup> the traditional tax scholarship seemed increasingly outdated and unsophisticated.<sup>20</sup> Second, the neutral and generally apolitical mode of traditional tax scholarship faced challenges from a range of movements, including work in critical legal studies which questioned core concepts and underlying assumptions (such as the efficiency of the market).<sup>21</sup> Additionally, other developments in legal scholarship (including law and economics with its increasingly complex and varied models of efficiency) expanded the expectations for legal scholarship.<sup>22</sup> Finally, Livingston contended that perhaps the most serious challenge to traditional tax scholarship was the reality that the more pressing policy questions of the day were ones for which the traditional model offered little guidance.<sup>23</sup> Attention to the idea of a neutral regime and a comprehensive tax base resonates in only limited ways with, for example, the major problems of international tax.<sup>24</sup>

In an effort to encourage the reinvention and, hence, the invigoration of tax scholarship for the future, Livingston made a number of recommendations for tax scholars and for legal institutions—two of which are particularly

17. *Id.* at 380–81. See generally Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency*, 61 AM. ECON. REV. 8 (1971) (discussing the maximization of social welfare using optimal tax theory); Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production II: Tax Rules*, 61 AM. ECON. REV. 261 (1971) (discussing the structure of optimal taxes); James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175 (1971) (discussing the principles which should govern an optimum income tax); F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927) (describing the theory of optimum income taxation).

18. Livingston, *supra* note 10, at 380–81.

19. See generally GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980) (applying public choice theory to taxation); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Ann Arbor Paperbacks 1965) (1962) (providing an overview of public choice theory); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (critiquing and expanding on traditional views of public choice theory).

20. Livingston, *supra* note 10, at 383.

21. *Id.* at 384–85.

22. *Id.*

23. *Id.* at 386.

24. *Id.* at 368, 386–87.

significant for international tax scholars. The first of these recommendations concerns the way in which tax scholars approach their work.<sup>25</sup> He advocated for an expanded range of normative frameworks and for projects that pursue empirical and other approaches.<sup>26</sup> His conception of “empirical” is rich and is intended to capture “work that gathers and describes evidence in a manner useful to lawyers and other policymakers.”<sup>27</sup> Thus, a rigid adherence to certain highly sophisticated methodologies from the social sciences is not essential. The goal is to gather and analyze relevant information in useful ways for those designing policy. Case studies on the effect of certain tax provisions, for example, could be a very valuable tool.

Livingston directly confronts one of the common critiques levied at those who encourage legal scholars to pursue more “empirical” work—that such efforts should be handled by the experts, e.g., economists and social scientists.<sup>28</sup> He argues that the work of social scientists is typically different in nature because of their training and their limitations—their projects tend to be broader in scope, more idealized, and less linked to actual legal rules or other systemic constraints familiar to legal scholars.<sup>29</sup>

Livingston’s second important recommendation urged tax scholars to pursue new material and to resist continued attention to topics to which little can be added and for which policymakers’ needs are low.<sup>30</sup> One new target area Livingston identified was international tax, which he characterized as one of the subjects “that have become important areas of tax practice and legislation, but to which scholars have been slow to respond.”<sup>31</sup> Livingston did not go into extensive detail on the international tax research agenda that might be crafted, but he did see the field as commercially significant and as one for which scholarship was “at a relatively early stage,”<sup>32</sup> because the fundamental tensions and core neutralities at stake had been identified, but much remained to be examined. Specifically, he envisioned international tax scholarship of the future as exploring comparative issues; progressivity (using tax rules to assist weaker economies); the possibilities of new forms of taxation (such as a valued added tax); and the international ramifications of any traditionally domestic question.<sup>33</sup> Legal scholars have an advantage in this work because the tax systems themselves are complex, and because detailed knowledge of both the international tax systems and the likely planning techniques would be

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25. Livingston, *supra* note 10, at 397.

26. *Id.* at 397–98.

27. *Id.* at 398.

28. *Id.* at 398 n.104.

29. *Id.*

30. Livingston, *supra* note 10, at 406.

31. *Id.*

32. *Id.* at 424.

33. *Id.* at 424–26.

important for serious work.<sup>34</sup> Additionally, the inherently global nature of cross-border taxation means that the arena is multicultural and multijurisdictional.<sup>35</sup> Thus, a straightforward appeal to efficiency would be incomplete.

The tax academy could not plausibly confine itself to determining the “best” (i.e., most efficient) rule and still hold sway over policy makers. The multiplicity of taxing sovereigns increases the gravity of many noneconomic issues, making it “difficult to contain [international tax] within a purely economic model.”<sup>36</sup> Correspondingly, Livingston advocated for a “diverse, interdisciplinary scholarship.”<sup>37</sup> International tax, therefore, appears to be capable of reviving tax scholarship on both of these Livingston prongs—it encourages use of expanded methodologies and analysis, and the subject matter itself would be sufficiently uncharted territory. But does the world of international tax hold the promise imagined? The next Part looks at the history and trajectory of international tax scholarship to answer this question.

## II. INTERNATIONAL TAX SCHOLARSHIP: PAST AND PRESENT

Can international tax scholarship live up to the aspirations that Livingston outlined? Is it free of the limitations and constraints he identified in traditional tax scholarship? Ultimately, as this Part determines, although a careful look at the history of international tax scholarship reveals that it has struggled with some of the same (or related) challenges as traditional tax scholarship, Livingston was nonetheless accurate in sensing that more widespread and in-depth pursuit of international tax questions inevitably would offer energy to the field of tax scholarship. That said, international tax did have its own history of normative, economics-driven theory which, though valuable in framing some issues, was ultimately in need of expansion.

The following section begins by sketching a brief overview of early work in international tax. The goal here is to offer a basic sense of the literature, its mission, and its general scope, so as to appreciate its position relative to traditional tax scholarship. The remainder of this Part considers international tax scholarship as measured against the specific qualities that Livingston expected it to possess, and which he thought would allow it to be part of the vibrant future of the tax academy.

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34. *Id.* at 426.

35. Livingston, *supra* note 10, at 427.

36. *Id.*

37. *Id.*



### A. *Early Scholarship*

One of the first pieces of scholarship in the United States to offer the promise of pursuing international tax issues was a short 1915 article by Edwin Seligman based on his 1914 address before the International Tax Association.<sup>38</sup> In these early years, the international community coalesced around the problem of double taxation—the concern that two jurisdictions would tax the same income.<sup>39</sup> The question they sought to resolve was: Assuming double taxation was agreed to be undesirable, which jurisdiction should have the right to tax?<sup>40</sup> As a leading American economist, Seligman, along with three other international economists, played a major role in the League of Nations's work in the 1920s on double taxation (following initial efforts by the International Chamber of Commerce).<sup>41</sup> Despite Seligman's important role in shaping the contours of the global system of cross-border taxation and the allocation of revenue among nations, his 1915 article was in fact a foray into differences between personal and property taxes, the proper theoretical grounds upon which to impose tax (citing the shift to “ability to pay” theories), and the need to preserve a local revenue base in the face of federal income taxation.<sup>42</sup> The only real international element in the analysis came from the consideration of property taxes and local taxes in other jurisdictions.<sup>43</sup> Even the organization which Seligman addressed was misnamed. The conference had been held under the auspices of the National Tax Association, but from 1908 to 1910, the organization was designated the “International Tax Association” because Canadian provinces joined the conferences.<sup>44</sup>

It was not until approximately the late 1930s that scholarship focused specifically on issues of international taxation. Double taxation, which formed the core of states' initial interactions over cross-border tax questions during the 1920s and 1930s, drew scholarly attention.<sup>45</sup> For example, a 1938 *Columbia Law Review* article outlined the “current” state of affairs. The author observed that the prior fifteen years contained much activity (including the work of the International Chamber of Commerce and the League of Nations), but that the

38. See Edwin R.A. Seligman, *Newer Tendencies in American Taxation*, 58 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 1 (1915).

39. Michael J. Graetz & Michael M. O'Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1033 (1997).

40. *Id.*

41. The other economists were Sir Josiah Stamp of Great Britain, Professor G.W.J. Bruins of the Netherlands, and Professor Luigi Einaudi of Italy. *Id.* at 1074.

42. Seligman, *supra* note 38, at 2–4.

43. *Id.* at 3, 6.

44. See A.C. Pleydell et al., *Introduction to State and Local Taxation*, 2 INT'L TAX ASS'N: PROC. ANN. CONF. ON TAX'N 9–10 (1909).

45. Harold Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 COLUM. L. REV. 809, 814–15 (1938) [hereinafter Wurzel, *Foreign Investment*].

field remained in its infancy because there was no universal understanding of international taxation.<sup>46</sup> Proceeding to consider double taxation and the underlying issues of jurisdiction to tax and sovereignty, the 1938 article worked from an international law perspective and ultimately concluded that countries can no longer ignore revenue laws of other jurisdictions.<sup>47</sup> The article also noted that “[t]he most reliable method of extending moderate assistance to American taxpayers is to follow the example set by the trade agreements and to proceed through bilateral treaties.”<sup>48</sup> In a follow-up article, the author noted the progress on treaties, but found that inadequate attention had been paid to the estate taxation of nonresidents.<sup>49</sup> Reflecting upon estate taxation in other jurisdictions, the article explored the uncertainties and problems in any United States efforts to tax the estates of nonresidents.<sup>50</sup>

Moving into the 1940s, examination of double taxation and bilateral treaties remained popular topics for analysis.<sup>51</sup> In a 1946 *Yale Law Journal* article entitled “International Tax Relations,” Henry S. Bloch and Cyril E. Heilemann (both from the United States Treasury Department) explored the connection between tax law and foreign economic policy.<sup>52</sup> In particular, the article examined ways in which international tax rules could facilitate or impede trade, including the effects of: 1) multiple levels of tax on cross-border income; 2) use of nondiscrimination provisions; 3) inclusion of exemption and credit systems in treaties; and 4) exchange of information.<sup>53</sup> Further foreshadowing more extensive work on these subjects today, Bloch and Heilemann’s piece devoted two and one-half pages to “The Role of

46. *Id.*

47. *See id.* at 857.

48. *Id.*

49. Harold Wurzel, *Nonresident Aliens and Federal Estate Tax: A Legislative Problem*, 40 COLUM. L. REV. 52, 52 (1940) [hereinafter Wurzel, *Nonresident Aliens*].

50. *Id.* at 52–53. In both articles, most of the materials referenced were statutes, treaties, cases, foreign law documents, and Restatements. *See generally* Wurzel, *Foreign Investment*, *supra* note 45; Wurzel, *Nonresident Aliens*, *supra* note 49.

51. *See, e.g.*, Ke Chin Wang, *International Double Taxation of Income: Relief Through International Agreement 1921–1945*, 59 HARV. L. REV. 73, 114–16 (1945) (providing a comprehensive discussion of the core questions of allocation of revenue and a historical review of international efforts to reach levels of consensus on these matters); Mitchell B. Carroll, Book Review, 39 AM. J. INT’L L. 852 (1945) (reviewing *Model Conventions for the Prevention of International Double Taxation and Fiscal Evasion*, League of Nations Doc. C.2.4.2 1945 H.A. (1945), noting the prodigious growth in such bilateral conventions and the corresponding significance of these developments); F.E. LaBrie, Book Review, 8 U. TORONTO L.J. 180 (1949) (reviewing F.E. KOCH, *THE DOUBLE TAX CONVENTIONS* (1947), analyzing the double-income tax treaties between the United Kingdom and other countries, devoting significant attention to the United States-United Kingdom treaty).

52. Henry S. Bloch & Cyril E. Heilemann, *International Tax Relations*, 55 YALE L.J. 1158 (1946).

53. *Id.* at 1162–64.

Intergovernmental Organizations in the Field of Taxation.”<sup>54</sup> These pages detailed the historical role international organizations such as the League of Nations and the United Nations played in the process of developing tax conventions.<sup>55</sup> Although the analysis remained focused on preliminary considerations of core questions of international tax design and economic implementation, it is nonetheless fascinating to see some of the most prominent contemporary tax questions in their decades-old, nascent forms.

As bilateral treaties became more established in the 1950s and 1960s, scholarship addressed a range of implementation-related questions concerning exchange of information and support for foreign judgments;<sup>56</sup> the growth of domestic incentives for foreign investment (e.g., the Western Hemisphere Trade Corporation);<sup>57</sup> and the potential for tax treaties to operate as an investment incentive or disincentive device.<sup>58</sup> In the 1960s, law review articles on international taxation were still introducing their audiences to the basic framework.<sup>59</sup> Of course some pieces explored questions in more depth, such as Detlev Vagts’s 1970 article entitled “The Multinational Enterprise: A New Challenge for Transnational Law.”<sup>60</sup> Although not an international tax article per se, the work offered a sophisticated examination of the changing structure, function, and role of multinational corporations, and contemplated the challenges that these global actors posed for individual nations absent a more coordinated legal and regulatory government response.<sup>61</sup> Similarly, a comparative examination of international tax policy between the United States

54. *Id.* at 1170–73.

55. *Id.* at 1171–72.

56. See Note, *International Enforcement of Tax Claims*, 50 COLUM. L. REV. 490, 491–92 (1950).

57. See Stanley S. Surrey, *Current Issues in the Taxation of Corporate Foreign Investments*, 56 COLUM. L. REV. 815, 830 (1956).

58. Note, *Tax Incentives to Investment Abroad*, 8 STAN. L. REV. 77, 102–03 (1955); see also Herrick K. Lidstone, *Double Taxation of Foreign Income? Or an Adventure in International Double Talk?*, 44 VA. L. REV. 921, 922–23 (1958) (evaluating the potential for both double taxation and deferral for foreign investments by U.S. business and the difficulty in determining what is “equitable” taxation of foreign investments); Stanley S. Surrey, *The United States Taxation of Foreign Income*, 1 J.L. & ECON. 72, 73–77 (1958) (reviewing the basic questions of jurisdiction, double taxation, foreign tax credits, deferral, and calls for tax incentives for foreign investment).

59. See, e.g., Adrian A. Kragan, *Double Income Taxation Treaties: The O.E.C.D. Draft*, 52 CAL. L. REV. 306 (1964) (walking through a basic structure of the Draft Double Taxation Convention and the dominant function of each article); Dan Throop Smith, *Tax Policy and Foreign Investment*, 34 LAW & CONTEMP. PROBS. 146, 149–50 (1969) (reviewing the basics of double taxation, foreign tax credits, and deferral.).

60. Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

61. *Id.* at 739–40.

and West Germany added depth to the broader discussion of international tax incentives for foreign investment.<sup>62</sup>

By the mid- to late-1960s, an economics-based language began circulating that defined and captured the normative implications of the work on international tax, especially the problem of double taxation.<sup>63</sup> This language identified two dominant “neutral” outcomes that international tax rules could achieve—capital export neutrality (CEN) and capital import neutrality (CIN).<sup>64</sup> Both neutralities assumed a normative goal of worldwide efficiency.<sup>65</sup> Over time, each neutrality became associated with certain solutions to double taxation and with certain economic policies. Going forward, this model shaped much normative discussion and analysis in international tax.<sup>66</sup> Policy experts with the United States Treasury Department even incorporated this framework into their papers, moving the policy from the purely academic arena to the policy arena.<sup>67</sup>

62. Dietrich von Boetticher, *A New Approach to Taxation of Investments in Less Developed Countries: A Comparison of Tax Laws in the United States and in West Germany*, 17 AM. J. COMP. L. 529, 556 (1969) (concluding that “the use of the tax credit method in both countries frustrates tax incentives granted by the foreign state” and analyzing the efficacy of tax treaties in remedying this failure).

63. See, e.g., PEGGY B. MUSGRAVE, UNITED STATES TAXATION OF FOREIGN INVESTMENT INCOME: ISSUES AND ARGUMENTS 109 (1969) (discussing the implications of double taxation on investment and capital flows); PEGGY BREWER RICHMAN, TAXATION OF FOREIGN INVESTMENT INCOME: AN ECONOMIC ANALYSIS 5 (1963) (analyzing the issue of double taxation from the point of view of economic efficiency). See also OFFICE OF TAX POLICY, U.S. DEP’T OF THE TREASURY, APPROACHES TO IMPROVE THE COMPETITIVENESS OF THE U.S. BUSINESS TAX SYSTEM FOR THE 21ST CENTURY 56 nn.77–78 (2007) (citing Musgrave’s seminal 1960s scholarship); Mihir A. Desai & James R. Hines, Jr., *Evaluating International Tax Reform*, 56 NAT’L TAX J. 487, 488 (2003) (noting the influence of Musgrave’s work from the 1960s in forming the “mainstays of the welfare analysis of international tax reform.”).

64. See OFFICE OF TAX POLICY, *supra* note 63, at 56.

65. See *id.* at 56 n.79. An additional neutrality was often added to this list because it corresponded to one of the three possible “solutions” to double taxation. The first solution, a foreign tax credit—the one introduced by the United States in 1918—comported with capital export neutrality. See *id.* at 56. The other main solution, an exemption of foreign source income, supported capital import neutrality. *Id.* The third possible solution, granting a deduction for foreign taxes paid, was often aligned with “national neutrality,” which differed from the first two because it did not operate from a premise of world-wide efficiency. See *id.* at 56 n.79 (“[N]ational neutrality, assumes that home governments cannot obtain reciprocal concessions necessary to approximate worldwide efficiency.”).

66. For example, a search of the LexisNexis law review file for the period 2001 to 2010 produced 107 tax articles referencing “capital export neutrality.”

67. See, e.g., George N. Carlson, *International Aspects of Corporate Shareholder Tax Integration*, 11 CASE W. RES. J. INT’L L. 535, 541–42 (1979) (noting that international double taxation has given rise to capital export neutrality as a “basic principle[] of U.S. international tax policy”).

This brief review of early scholarship highlights a few striking points. First, not surprisingly, the total volume of international tax scholarship was low, and perhaps correspondingly, the work tended to address the core questions at a less detailed level than we might expect today.<sup>68</sup> Second, and similarly, the number of academics identifying themselves as working in the area remained small throughout the 1980s. A search of the American Association of Law Schools' (AALS) database for the years 1925 through 1985 revealed that no professors listed international tax as one of their subjects until 1955 when Herrick Lidstone, Assistant Director of the International Program in Taxation at Harvard Law School, listed United States and Foreign Taxation as subjects he taught.<sup>69</sup> By 1960, both Stanley Surrey and Oliver Oldman, professors at Harvard Law School (and both actively involved in Harvard's International Tax Program) were identified as working in the area of international tax.<sup>70</sup> But even in 1985, the AALS directory contained very few academics listing international tax as a "subject."<sup>71</sup> Certainly the listings are likely to be incomplete as a reflection of scholarly work in the field, but nonetheless, the field was not teeming with participants.

#### *B. Continued Growth in International Tax Scholarship*

Moving through the later decades of the twentieth century to the present, international tax scholarship has seen a significant growth in both output and participants. For example, a search of Westlaw's law review index for 1980 yields one article citing the phrase "international tax" three or more times. By

68. The observation regarding volume is intended to signal the likely number of scholars and interested (and sophisticated) readers of international tax scholarship at this time and how that number might impact the nature of the discourse in the field. Whether or not more or fewer scholars worked in corporate tax or state and local taxation is an interesting question, but a comparative one that is not explicitly at issue here.

69. ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 175 (1955). Although programs in international taxation have been introduced in recent years (for example, University of Florida Law School's LL.M. in international taxation began in 2005, and New York University Law School's LL.M. in international taxation began in 1996), the Harvard International Tax Program started in 1952 pursuant to a United Nations Resolution. It has had a distinctive focus on training officials occupying senior positions in government, international organizations, academia, and the private sector. See *International Tax Program*, HARVARD LAW SCH., <http://www.law.harvard.edu/programs/about/tax/international-tax-program.html> (last visited Oct. 6, 2010); *International Alumni for Masters of Law in International Taxation*, N.Y. UNIV. SCH. OF LAW, <http://www.law.nyu.edu/alumni/alumniassociations/internationaltax/index.htm> (last visited Oct. 6, 2010); *The LL.M. in International Taxation*, UNIV. OF FLA.-LEVIN COLL. OF LAW, <http://www.law.ufl.edu/tax/international/pdf/07brochure.pdf> (last visited Oct. 6, 2010).

70. ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 254, 321 (1960).

71. See generally ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS (1985) (showing self-reported specialty areas of all responding law professors).

the year 2000, that number increased to over 60, and in 2009, exceeded 125. During this same window, *Tax Notes International* began publication in 1989, and in 1996, the Bureau of National Affairs introduced the *Transfer Pricing Report*.<sup>72</sup> Additionally, thirteen professors identified themselves in the AALS biography section as teaching “international tax” during the 1994–1995 academic year; ten years later, in 2004–2005, the number almost doubled.<sup>73</sup> Once again, these numbers are rough indications of the legal community’s increasing participation in conversations and inquiries about international tax policy. Whether the specific numbers are in part a reflection of increasing law faculty size, increased course specialization, or broader self-identification, there is nonetheless a palpable difference in the prominence of international tax. The interesting question for us is: What does this change mean in terms of international tax research and scholarship?

C. *Implications for the Modern Place of International Tax*

With the passage of more than ten years since Livingston’s article, and a quick but targeted look at the history of international tax scholarship in the United States, what can we say about international tax as one of several crucibles of hope for a revitalized tax academy? We can see that many of Livingston’s instincts regarding international tax were on target, although international tax proved much more similar to traditional tax scholarship than perhaps was anticipated. A number of specific points elaborate both the problematic similarities and the fruitful differences.

Despite Livingston’s characterization of international tax as a new or renewed field,<sup>74</sup> it has a longstanding and persistent history (although a somewhat marginal place in the tax academy). Given that history, it is not surprising that the field reflects many of the elements and practices of traditional tax work. The early international tax writings described in Part II.A were similar in many respects to traditional tax scholarship—they were positive, doctrinal, and closely linked to economics. Recall that the initial, galvanizing issue for the global community on international taxation was the problem of double taxation, and that economists were selected to lead the charge in that discussion.

Perhaps more significantly, although Livingston accurately viewed traditional domestic scholarship—with its grounding in the quest for a comprehensive tax base—as of limited relevance for international tax, the result was not a field free of constraining and limiting normative economic

72. The Report is devoted to one of the most controversial and high-dollar-value issues in international tax: questions of cross-border transfer pricing.

73. ASS’N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS (1994–1995); ASS’N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS (2004–2005).

74. Livingston, *supra* note 10, at 406.

models. As outlined above, by the 1960s a normative economic framework for international tax was introduced that became the dominant model for international tax analysis.<sup>75</sup> The dominant model in traditional tax scholarship initially provided both a coherent focus and a valuable and accessible way to evaluate many policy questions, but *ultimately* proved to be an incomplete model for tax scholarship. So too has the position of the core international tax model shifted. By the 1990s, a notably more critical eye was cast on the CEN/CIN framework, though it continued to function as the dominant model.<sup>76</sup>

This critical shift reflected a broader trend that Livingston identified for the tax field as a whole. First, the increased range of economic analysis being introduced into legal scholarship led tax scholars to consider more sophisticated and differentiated ways to evaluate efficiency in the global tax setting. Some considered the CEN/CIN approach as one that conceived of efficiency in terms that were far too narrow.<sup>77</sup> Others specifically articulated an additional measure of neutrality to be incorporated into policy analysis.<sup>78</sup>

Second, the overall growth in the number of participants in international tax scholarship increased the scope of the discussion, the perspectives, and the questions that the academy began to pursue. Some scholars incorporated economic models, such as game theory, that were not based on the familiar neutralities.<sup>79</sup> Others extended the concept of economic neutrality beyond its

75. See *supra* notes 63–67 and accompanying text.

76. See, e.g., Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. L. 45, 67 (2002) (noting that the fiscal, social, and political needs of Sub-Saharan Africa are persuasive rationales for departing from the traditional capital export neutrality analysis).

77. See, e.g., Daniel Frisch, *The Economics of International Tax Policy: Some Old and New Approaches*, 47 TAX NOTES 581, 590–91 (1990) (contending that current policy grounded in capital export and capital import neutrality is inadequate because it does not reflect the significant changes in the structure of the global economy).

78. See, e.g., Desai & Hines, *supra* note 63, at 499 (urging capital ownership neutrality and national ownership neutrality as important benchmarks for international tax policy reforms); Michael P. Devereaux, *Capital Export Neutrality, Capital Import Neutrality, Capital Ownership Neutrality and All That* (June 11, 1990) (unpublished manuscript) (on file with author) (introducing concept of CON).

79. See, e.g., Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 949–52 (2000) (using game theory to show how unilateral policy interactions reduce tax levels to a similar extent as treaties); Eric T. Laity, *The Competence of Nations and International Tax Law*, 19 DUKE J. COMP. & INT'L L. 187, 233–36 (2009) (analyzing institutional competence of nations in global economic development using game theory); Jack Mintz & Joann M. Weiner, *Some Open Issues Involving a Consolidated Corporate Tax Base in the European Union*, 62 TAX L. REV. 81, 85–88 (2008) (using game theory to analyze the negotiations among European Union countries concerning a Common Consolidated Corporate Tax Base); Diane M. Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 123–34 (2007) (applying international relations theory to the discussion of how to relieve double taxation); Adam H. Rosenzweig,

original role with the movement of capital to apply it in the context of labor, a re-conceptualization that reflected the changing realities of the late twentieth century global economy.<sup>80</sup> Still others reached into disciplines beyond economics (philosophy, international relations, sociology) to develop a more complete understanding of the issues relevant in international tax.<sup>81</sup> Although some scholarship continued to adopt a normative stance, other work presented case studies and related empirical work in an effort to provide context for analysis.<sup>82</sup>

Third, as Livingston intuited, some of the driving, unresolved questions of international tax would ultimately push scholars to reach beyond the standard framework. The absence of a single sovereign establishing global cross-border tax policy inherently introduced a dimension notably distinct from the

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*Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 582–86 (2007) (contending that international tax arbitrage can be used to benefit developing countries).

80. See, e.g., Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1545–46 (2009) (proposing four labor-related neutralities).

81. See, e.g., Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. REV. 1, 69–72 (2010) (using moral political philosophy in a discussion of global distributive justice); Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASH. U. GLOB. STUD. L. REV. 1, 29–33 (2010) (discussing the use of soft governance in the development of international tax policy norms); Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911, 937–38 (2007) (discussing the philosopher king model in conjunction with the OECD); Ring, *supra* note 79, at 90–93 (evaluating the use of international relations theory for use in tax debates).

82. See generally Eduardo Baistrocchi, *The Transfer Pricing Problem: A Global Proposal for Simplification*, 59 TAX LAW. 941 (2006) (reviewing transfer pricing issues from the perspective of developed and developing countries by comparing Argentina and the United States); Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT'L L.J. 377 (2009) (examining the history of the Netherlands Antilles' offshore financial sector to predict how changes in international regulatory climate may affect other international financial centers); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639 (2005) (using a hypothetical case study to examine the lack of tax treaties between the United States and Sub-Saharan Africa); Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171 (2001) (using case studies to discuss the taxation of e-commerce); Jinyan Li, *The Rise and Fall of Chinese Tax Incentives and Implications for International Tax Debates*, 8 FLA. TAX REV. 669 (2007) (assessing the economic efficiencies of tax incentives by looking at the positive externalities of foreign direct investment in China and the effect of tax incentives on investment behavior and tax discrimination among local businesses); Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79 (2002) [hereinafter Ring, *One Nation*] (using case studies to discuss cross-border arbitrage); Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155 (2008) [hereinafter Ring, *What's at Stake*] (using three case studies to consider how sovereignty claims are manipulated in tax debates, how states think about sovereignty in taxation, and what that suggests about the future of international tax).



domestic sphere in which traditional tax work developed.<sup>83</sup> The reality of multiple sovereigns is a pervasive and significant force in the design and implementation of international tax policy, whether in domestic legislation on cross-border transactions, in bilateral tax treaties, or in “soft law” generated by international organizations such as the Organisation for Economic Co-operation and Development.<sup>84</sup> This reality puts a premium on developing an understanding of the complex ways in which tax policy develops on a global scale—how “norms” are established and how countries influence each others’ policy choices.<sup>85</sup> Thus, attention to the emerging theories of international relations, of international organizations, and of global networks adopts increasing significance.<sup>86</sup>

The multiplicity of sovereigns not only requires that we study and understand the dynamic process of developing tax norms and tax laws on this stage, but it also spawns certain very specific challenges for the international tax system. The absence of an overarching tax authority allows capital and labor mobility, tax avoidance, and tax competition to converge and create serious challenges to collecting revenue. Tax competition on the one hand and tax avoidance on the other constitute the “legal” and “illegal” constraints on certain types of revenue collection. What are the implications? States, international organizations, and scholars have argued the costs can include limited revenue and/or shifted tax burdens.<sup>87</sup> Although some of the underlying

83. Livingston, *supra* note 10, at 427. See also Allison Christians, *Case Study Research and International Tax Theory*, 55 ST. LOUIS U. L.J. 331 (2010) (reviewing the reliance on case studies by international tax scholars and offering an assessment of how that use comports with a more specific conception of the case study approach in the social sciences).

84. Ring, *What’s At Stake*, *supra* note 82, at 157.

85. See generally Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT’L L. 797 (2009) (tracking the development of global norms through international and domestic initiatives and identifying a framework for taxing and spending on a global level).

86. See Christians, *supra* note 81, at 37 (concluding that a better understanding of how transnational networks produce tax governance norms can help to understand how lawmakers develop national tax policy norms); Diane M. Ring, *Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World*, 33 FORDHAM INT’L L.J. 649, 650 (2010) (using case studies to map “the inquiry into the role of international organizations in tax policy”). Even an empirical concept as familiar as the case study, which has been employed without much angst by international tax scholars, can itself be examined in more detail, and the resulting knowledge can help international tax scholars make more conscious and informed decisions. See also Christians, *supra* note 83 (suggesting that the use of case studies in international tax studies could benefit from the method-related considerations found in the social sciences).

87. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 14 (1998) (discussing the negative effects of globalization on the development of international tax systems, including shifting tax burdens); Reuven S. Avi-Yonah,

questions (e.g., competition, efficiency) exist in a federal system as well, the core residual difficulty stems from the multiple sovereigns.<sup>88</sup> Thus, international tax may derive more value from examining the experiences of regulation in the international banking and finance arenas.

In addition to the unwieldiness of multiple taxing jurisdictions, the related question of global distributive justice continues to suffuse theoretical considerations of international tax policy. Distributive justice has been a longstanding companion of domestic tax analysis. In that context, political philosophers frequently made assumptions about the nature of the state and the “agreement” by members of that state to accept the power (or force) of the state and, hence, its ability to collect and redistribute tax.<sup>89</sup> In a global setting, this leap is not so easily supported, and it becomes difficult to find a firm grounding for specific obligations to other states and to members of other states.<sup>90</sup> Yet these questions are a core element of the debate over the global allocation of tax revenue.<sup>91</sup> Although some tax policies may have the effect of increasing the tax pie and/or increasing economic activity, at some point the real debate involves the division of a relatively set amount of tax revenue and economic activity.<sup>92</sup> To what extent does the status of a country as developing or low-income constitute a factor in this allocation process? Does distributive justice resonate on this level? Political philosophers have insufficiently explored these questions. The pressing and concrete questions of the tax academy may provide impetus for further examination, although no ready resolution seems likely.

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*Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576, 1578 (2000).

88. See Avi-Yonah, *supra* note 87, at 1575–76 (stating that tax competition derives from sovereign countries’ attempts to earn portfolio and direct investment through lower taxation of foreigners); Ring, *supra* note 86, at 702 (stating that tax competition refers to a country’s efforts to make itself more attractive to taxpayers by reducing or eliminating taxation on certain types of taxpayers, or by failing to disclose information to other governments).

89. See, e.g., Benshalom, *supra* note 81, at 5 (discussing the statist theory of distributive justice, which provides that associational relationships among members of the same state, rather than any moral obligation, provide the basis for distributive justice).

90. See *id.* at 6 (discussing the limitations of philosophical perspectives, including cosmopolitanism, in adequately supporting an obligation to redistribute beyond the nation state).

91. See Kim Brooks, *Inter-Nation Equity: The Development of an Important but Underappreciated Tax Policy Objective*, in 34 TAX REFORM IN THE 21ST CENTURY: A VOLUME IN MEMORY OF RICHARD MUSGRAVE at 471, 475, 480 (John G. Head & Richard Krever eds., Ser. on Int’l Taxation, 2009) (discussing Peggy and Richard Musgrave’s 1972 essay, *Inter-Nation Equity*, proposing allocation of tax revenue through apportionment among participating countries and focusing on the national gain of the state as the measure of the international tax system).

92. See Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161, 166–67 (2003) (suggesting that growth in developing countries can be promoted through use of domestic and international tax systems).

Ultimately, this closer look at the world of international tax scholarship suggests that Livingston was correct when suggesting that the field offered potential for invigorating work both because of its relative freshness and because it compels scholars to reach beyond traditional tax analysis—and even beyond the traditional methods and models of international tax. The next Part considers what additional guidance or suggestions can be offered to international tax scholars, eager to stake out a valuable and first-rate role.

### III. INTERNATIONAL TAX SCHOLARSHIP OF THE FUTURE

If Livingston was correct—and international tax can be a central part of an enlivened tax academy of the future (both because it is “new” and because its problems truly demand inquiry beyond the historical confines of the legal realm)—then why have international tax scholars themselves circled back to ask some of the very same questions legal scholars in the late twentieth century posed? What should international tax scholars be doing? And, how can they do that work without feeling that they are simply second-rate philosophers, political scientists, or the like, as tax scholars have more generally feared with regard to their interdisciplinary ventures?

#### A. *Research Agendas*

As to the first concern regarding the scope of projects, the relative youth of the field (more in terms of volume than time) offers many important issues for study. Scholars can provide valuable work on a wide range of topics with varying degrees of abstraction. Most broadly, the fundamental questions of inter-nation equity (or even inter-person equity) remain under-examined and under-theorized, as noted in the prior section. Does international tax policy require inter-nation equity? If so, why and how is inter-nation equity defined?

Another important research avenue comes from the significance of coordination and shared agreement among states on questions of international tax.<sup>93</sup> The prospect of seeking agreement places a premium on understanding all of the processes involved. This author has advocated the use of the extensive international relations literature to better understand the complicated

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93. See Avi-Yonah, *supra* note 87, at 1675 (concluding that a multilateral solution to international taxation is essential to preserve the fundamentals of taxation); Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 Nw. J. L. & SOC. POL'Y 19, 29–35 (2010), available at <http://www.law.northwestern.edu/journals/njls/v5/n1/2/2Christians.pdf> (discussing the potential of developing countries to influence tax policy through the use of international organizations such as the G20 and the OECD); Ring, *One Nation*, *supra* note 82, at 171–72 (suggesting the importance of research concerning the influence of tax harmonization techniques on future coordination attempts); Julie Roin, *Taxation Without Coordination*, 31 J. LEGAL STUD. S61, S62–63 (2002) (discussing the desirability of and impediments to tax base harmonization and suggesting actions to make harmonization more likely).

dynamic among individual states and their component parts, international organizations, and other multi-lateral players who create the international tax policy we see today.<sup>94</sup> Case studies here could provide a powerful picture of policy formation that would be relevant for both scholars and policymakers.

To the extent that understanding and fostering cooperation in the realm of international tax becomes an important goal of tax policy, it would be useful to consider what our best examples or models of cooperation look like, and what qualities are central to their success. Even if these qualities prove idiosyncratic and difficult to replicate (e.g., a certain degree of geographic proximity or historical connection), that information is valuable. More recently, the debate over exchange of information has dominated the international tax press and has even penetrated mainstream media.<sup>95</sup> As we continue to push beyond the basic idea of a commitment to the exchange of information and examine the realities of its implementation, many risks and limits emerge. Not all such agreements have looked or operated in the same manner. If some arrangements have functioned more smoothly and generated the anticipated and desired flow of information, what features—explicit or implicit—were crucial to that level of effectiveness? Additionally, to what extent does the ever-changing reality of technology influence what is plausible and what is desirable in the exchange of information?<sup>96</sup>

Even the core subjects that have received both popular and academic attention, such as the advisability of deferral for United States corporations operating through foreign subsidiaries, could be further explored to make important additions to the current literature.<sup>97</sup> For example, a more detailed examination of whether and to what degree, assumptions about the implications of deferral, elimination of deferral, or permanent exemption of foreign source income vary by industry, by time frame, or by other factors, is essential for major policy decisions.

This discussion does not establish the definitive research agenda for the international tax scholar but rather offers a sense of the scope of research beyond the still-necessary doctrinal analysis. But can international tax scholars

94. See, e.g., Ring, *supra* note 79, at 86.

95. See Lynnley Browning, *Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion*, N.Y. TIMES, June 18, 2010, at B3 (detailing the Swiss government's agreement to give American authorities the records of people who allegedly evaded taxes with accounts at Switzerland's largest bank, UBS).

96. For an interesting look at the link between technology and taxation in developing countries, see Richard M. Bird & Eric M. Zolt, *Technology and Taxation in Developing Countries: From Hand to Mouse*, 61 NAT'L TAX J. 791 (2008).

97. See, e.g., J. Clifton Fleming, Jr. et al., *Worse Than Exemption*, 59 EMORY L.J. 79 (2009) (explaining how the deferral privilege, among other things, in the U.S. tax regime ultimately gives United States corporations an advantage over competitors in countries using an exemption system).

pursue this research with confidence that they add distinctive value to the task? Can tax scholars avoid being second-rate social scientists?

*B. Research and Methodology in an Expanded International Tax Research Agenda*

Livingston argued that tax academics could perform their role successfully because international tax is relatively complicated and few non-lawyers likely invest in developing their knowledge base.<sup>98</sup> But additional factors support the active participation of legal scholars in the pursuit of tax analysis even where that work draws upon other disciplines. First, some of the disciplines most relevant for international tax (including international relations theory and related examinations of international organizations and cross-border networks) almost never seek to apply their broad theories and concepts in the context of international tax. To the extent that such disciplines introduce any case studies or context-specific analysis, the examples are commonly drawn from defense,<sup>99</sup> military,<sup>100</sup> environmental,<sup>101</sup> and even human rights problems<sup>102</sup>—but not tax. Thus, if we seek to use ideas from the vast international relations literature to improve our assessment of international tax policy formation, tax scholars will need to take the initiative in linking the two fields.

Second, and somewhat related, the examination of theories from other disciplines in the international tax setting is not simply a service to those responsible for tax policy. Tax can offer new insights into the very field from which it borrowed method and theory.<sup>103</sup> For example, notable strands of the literature on sovereignty often characterize the sovereignty concept as

98. See Livingston, *supra* note 10 and accompanying text.

99. See, e.g., Douglas J. Murray & Paul R. Viotti, *Introduction* to THE DEFENSE POLICIES OF NATIONS: A COMPARATIVE STUDY, at xvii, xix (Douglas J. Murray & Paul R. Viotti eds., 3d ed. 1994) (introducing the book's comparative studies, which evaluate a country's perception of the international environment as part of a comparative study of national defense policies around the world).

100. See, e.g., Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853 (2010) (using empirical studies and comparative analysis to contend that the use of private military companies is in line with international legal norms).

101. See, e.g., Kevin Stairs & Peter Taylor, *Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 110 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (examining the use of NGOs in international policymaking through a case study of waste disposal at sea).

102. See, e.g., Mark Toufayan, *Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age*, 31 MICH. J. INT'L L. 307 (2010) (using a case study to discuss human rights' transjudicialism).

103. See Rubin, *supra* note 1, at 1899 (contending that law is an independent discipline and that the developments in law through time impact norms in society and thus the work, data, and experience of other disciplines).

undesirable, outmoded, or on the decline.<sup>104</sup> However, examination of “sovereignty” in the tax context reveals the distinctive role that it plays rhetorically, politically, and fiscally in taxation.<sup>105</sup> Even if that distinctive application of the sovereignty concept is insufficient to completely shift the views of an IR scholar, it should give that scholar pause.

Third, much of the angst tax scholars experience when venturing into other disciplines derives from the critiques of empirical scholarship leveled against legal scholars in the past.<sup>106</sup> Without rehashing that debate, some criticisms nonetheless may resonate with those who, for example, might negatively compare the empirical work of legal scholars to formal work by social scientists.<sup>107</sup> Several important points, however, caution against viewing empirical work as the sacrosanct dominion of the social scientist. One, quantitative research is not the only type of empirical research; much valuable empirical information comes from a variety of more qualitative approaches. Two, many choices and decisions subject to challenge are embedded within quantitative analysis itself, and tax scholars would benefit from witnessing how other disciplines struggle with their own role, meaning, methods, and boundaries.<sup>108</sup> Three, legal scholars are often comfortable with messier and less stylized models that may imperfectly but more comprehensively reflect the world, and thus, may more readily translate into real life policy dilemmas that

104. Ring, *What's at Stake*, *supra* note 82, at 165–66 (reviewing assessments of sovereignty in the age of globalization).

105. *Id.* at 157, 166.

106. See, e.g., Epstein & King, *supra* note 1, at 6 (noting flaws in current empirical legal scholarship); Exchange, *Empirical Research and the Works of Legal Scholarship*, 69 U. CHI. L. REV. 1–209 (2002) (reiterating previously stated concerns with the state of empirical legal scholarship).

107. See, e.g., Frank Cross et al., *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002) (suggesting that some of Epstein and King's criticisms of empirical legal research violated their own rules of inference); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002) (rejecting Epstein and King's “indictment of legal scholarship”); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002) (criticizing Epstein and King's methodology).

108. Professors Frank Cross, Michael Heise, and Gregory Sisk make the following observations:

[Empirical legal research and rules for drawing inferences] are aspirational, and very few studies in any field are clearly in full compliance with all of those rules. Legal researchers should not be intimidated by these rules and the authors' associated criticisms. Researchers should not be deterred from attempting empirical research but should simply strive to attain the article's inferential standards insofar as practicable. We fear that Epstein and King were overcome by zeal in the intensity of their criticism of the current state of legal research. Such research warrants and would benefit from a well-conducted study and fair criticism, but Epstein and King's polemic does not really tell us much about the true state of empirical legal research.

Cross et al., *supra* note 107, at 151.

our legal system encounters. Four, the goals of tax and other legal scholars are distinctive: legal scholarship is ultimately directed toward policy.<sup>109</sup> Even if a particular work is predominantly descriptive (e.g., a case study), influencing, shaping, and guiding the legal regimes is a vital mission of legal scholarship, and failure to appreciate this distinction between law and other disciplines can breed confusion.<sup>110</sup> The vision of legal scholarship urged by Livingston and others as an exercise in practical reasoning continues to reflect the needs of a society which must integrate analysis, facts, values, and competing goals.

### C. Recommendations

What advice might be offered to an international tax scholar who is open to participating most fully in the project of legal scholarship? Beyond the identification of an expansive research agenda in Part III.A, and the exhortation to engage with other fields in Part III.B, two distinct types of advice might be valuable. First, international tax scholars would benefit from explicitly questioning the goal of a given project: Is it advocating a particular action, urging acceptance of a specific norm, explicating a range of potentially applicable norms, or presenting empirical information (qualitative or quantitative) with an expectation that it will add to our body of understanding? Policy is ultimately the result of multiple, connected layers of analysis, and legal scholars may be engaged in pursuing one or more of them at any time, fully aware that they are operating in a discipline whose larger role is more intimately connected to unraveling and constructing debates over legal norms and prescriptions.

Second, international tax scholars can consider pursuing a number of concrete techniques or steps, most of which should be apparent or implicit from the discussion in this essay, including: 1) enthusiastically accept discussion, debate, and even challenges about the risks of an expanded reach into the social sciences for their work; 2) increase familiarity with, and consciousness of, methods and techniques, paying particular attention to the relevance of any approach for the mission of legal scholarship; 3) directly engage with social science literature with the dual aim of enhancing tax policy and introducing international tax to social scientists, possibly through joint

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109. See, e.g., Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003) (examining the possibility of a worldwide international tax policy).

110. Goldsmith and Vermeule suggest that non-legal scholars, as “outsiders,” not surprisingly:

[O]verlook that legal scholarship frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones. Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists’ rules can indict legal scholarship—any more than strict adherence to the rules of baseball supports an indictment of cricket.

Goldsmith & Vermeule, *supra* note 107, at 153–54.

projects; and 4) collaborate with international tax scholars outside the United States.<sup>111</sup>

#### CONCLUSION

International tax scholars can make a valuable contribution on behalf of the legal academy. It is through law that the compelling normative and prescriptive questions of international tax can be most fruitfully evaluated. The resulting research, analysis, and recommendations will shape decisions in international tax policy and thus directly impact our fiscal, national, and global future. To maximize the relevance and value of their work, international tax scholars must embrace the expanded agenda and methodologies available to them without surrendering the distinctive sensitivity to the legal system and the real world that their own legal training has afforded them. Such a rich research mission ensures that international tax scholars remain responsive partners in a continuing effort to refine and reform international tax policy in a complex commercial, economic, and political environment.

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111. Such scholars will be more intimately aware of international tax, and yet, may invite a unique way of employing social sciences, thereby combining a comparative legal dimension with a comparative cross disciplinary dimension.



